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In the

Supreme Court of the United States

STATE OF ALASKA, DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Under the Clean Air Act, can the EPA override a state permit decision when the state is authorized to carry out its own air pollution program and the permit does not violate any federal pollution standard?

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INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of Petitioner, State of Alaska.[1] Written consent was granted by counsel for all parties and lodged with the Clerk of this Court.

Pacific Legal Foundation (PLF) is the largest and most experienced nonprofit public interest law foundation of its kind in America. PLF was founded in 1973 and provides a voice in the courts for mainstream Americans who believe in limited government, individual rights, and free enterprise. PLF litigates nationwide in state and federal courts with the support of thousands of citizens from coast to coast. PLF supports a broad view of the public interest and promotes balance and common sense in the administration of laws and regulations.

There is an alarming trend among federal agencies and in the courts to expand the enforcement power of the federal government by adopting statutory interpretations that cannot be squared with the plain meaning of the act, the intent of Congress, or constitutional principles of federalism. This case is a singular example of government overreaching.

The Ninth Circuit has held that the Environmental Protection Agency (EPA) may override a discretionary permit decision of a state, under a federally-approved state air pollution program, without a showing that the permitted activity will violate any federal air quality standard. That decision defies common sense and undermines the intent of Congress as expressed in the Clean Air Act (CAA) to rely on the states to ensure local air quality.

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[1] Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

PLF has a long history of amicus participation in environmental cases before this Court. For example, PLF was an amicus participant in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159 (2001); *Steel Company v. Citizens for a Better Environment*, 523 U.S. 83 (1998); *Bennett v. Spear*, 520 U.S. 154 (1997); *Douglas County, Oregon v. Babbitt*, 516 U.S. 1042 (1996); *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995); and *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984). PLF believes its public policy perspective will provide a necessary viewpoint in this case.

STATEMENT OF THE CASE

Teck Cominco Alaska, Inc. (Cominco), owns and operates a mine, known as the Red Dog Mine, in the State of Alaska in partnership with the Northwest Arctic Native Association. The mine sits on Association property 100 miles above the Arctic Circle in a remote part of the state. It is the largest zinc concentrate producer in the world. The closest residential communities are the native villages of Kivalina and Noatak. The mine is the largest private employer in a vast area with a historically high unemployment rate. Power for the mine, which operates continuously, is provided by the mine's six diesel-driven electric generators. To increase production, in 1998, Cominco proposed the addition of a new generator. This required a state permit.

The State of Alaska is an "attainment," or clean air area, for nitrogen oxide (NOx). That is, its air quality is cleaner than the national standards for this constituent. Because the new generator would increase NOx emissions, Cominco was required to obtain a Clean Air Act permit known as a PSD (Prevention of Significant Deterioration) permit. PSD permits are available from the Alaska Department of Environmental Conservation (ADEC) under the state's EPA-approved clean air

program. As a permit condition, new sources of NOx emissions must be equipped with BACT (best available control technology) to minimize pollutants. BACT is defined as

> an emission limitation based on the maximum degree of reduction of each pollutant subject to regulation under this chapter emitted from or which results from any major emitting facility, which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for such facility through application of production processes and available methods, systems, and techniques, including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques for control of each such pollutant.

42 U.S.C. § 7479(3).

One option for BACT involved the use of Selective Catalytic Reduction, or SCR, on the new generator. SCR is a process involving injection of ammonia, or urea, into the exhaust and combining it with a catalyst to ensure more complete combustion. However, ADEC concluded that the cost of SCR was excessive—$2.9 million in capital costs and nearly $635,000 in annual operating expenses. As an alternative, Cominco proposed installing "Low NOx" controls on *all* of its generators, not just the one subject to permitting. This method relies on high-combustion air temperatures to atomize toxic particles and reduce NOx emissions. ADEC determined that this technology was more cost effective than SCR and the use of "Low NOx" on *all* the generators would reduce overall emissions from the mine more than SCR on the new generator. In 1999, ADEC designated "Low NOx" controls as BACT and issued Cominco a PSD permit.

Only after the close of the comment period did EPA express its disagreement with ADEC's BACT determination.

EPA ordered ADEC to require the use of SCR on the new generator. Because SCR had never been required as BACT for this type of generator, was less cost effective than "Low NOx" controls, and could result in more overall emissions, ADEC refused to modify its permit. As a result, EPA ordered Cominco not to operate the new generator. Cominco and ADEC then filed suit in federal court for a determination of whether EPA has unilateral authority to override the State's discretionary BACT determination. In July, 2002, the Ninth Circuit held that EPA *can* override a state's BACT determination. The State of Alaska then petitioned the case to this Court.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Under the Clean Air Act, the State receives federal authorization to implement its own air pollution program only after satisfying EPA that the state program meets all federal standards for implementation, maintenance, and enforcement. *See* 42 U.S.C. § 7410(a)(1). Alaska met these exacting standards and received EPA authorization for its state air pollution program. At no time in this case has EPA questioned Alaska's fitness to keep its federal authorization or threatened sanctions against the State for failure to meet federal air pollution standards, although the EPA has the power to impose sanctions, including the suspension of federal highway moneys. *See* 42 U.S.C. § 7509. At root, EPA's objection in this case stems from its preference for a more costly, but less effective, emission control technology than the State of Alaska selected for the Red Dog Mine. Because the State's selection of "Low NOx" controls would have minimized overall emissions at the mine, it defies common sense and the clear purpose of the Act to allow EPA to interfere with the State's implementation strategy. Moreover, federal deference to discretionary state permitting decisions ensures finality and fairness in the administrative process, improves regulatory efficiency,

empowers local enforcement officials, and allows for an appropriate accommodation of local interests and needs. Congress could not have intended that the statutory scheme of relying on state implementation would be undermined by EPA overriding individual state permit decisions.

ARGUMENT

I

CONGRESS INTENDED THE STATES—NOT EPA—TO ASSUME RESPONSIBILITY FOR IMPLEMENTATION OF THE NATIONAL AIR QUALITY STANDARDS

Under the Clean Air Act, EPA is authorized to set general goals for air quality. But the means of achieving those goals was left to the states: "Increasingly, the primary role of implementing these goals falls to the states." *See* E. Donald Elliott, *Federal Versus State Environmental Protection Standards: Can a National Policy Be Implemented Locally?*, 22 Envtl. L. Rep. 10010 (1992). Indeed, in the CAA, Congress expressly recognized the preeminent role of the states in addressing air pollution:

> Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State by submitting an implementation plan for such State which will specify the manner in which national primary and secondary ambient air quality standards will be achieved and maintained within each air quality control region in such State.

42 U.S.C. § 7407(a).

The effect of this provision was set out by this Court in *Train v. Natural Resources Defense Council*, 421 U.S. 60 (1975). In that case, this Court acknowledged that Congress plainly charged EPA with the responsibility to set national

ambient air quality standards. *Id.* at 79. But, this Court observed that EPA is just as plainly "relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* According to this Court:

> Under §110(a)(2), the Agency is required to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is in compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

Id.

No doubt the willingness of a state to adopt a State Implementation Plan under the CAA, like Alaska did in this case, rests in part on the recognition that the state will have wide discretion in how it achieves the national ambient air quality standards without ad hoc interference by EPA. Although the states were generally considered recalcitrant in assuming this responsibility in the 1970's, hard evidence of a change toward strong state implementation of environmental laws was apparent by the mid 1980's. *See* Elliott, *supra*, at 10010. Congressional Budget Office calculations for 1987

indicated, for example, that well over 80% of total government expenditures on the environment occurred at state and local levels. *Id.* This same pattern was reflected in clean air expenditures. *Id.* In enforcement, the change was even more striking. *Id.* Approximately 70% of all environmental enforcement cases was initiated by the states. *Id.* This shift toward increased state responsibility formed the basis for Elliott's conclusion: "In many areas today, particular state agencies are as sophisticated, if not more so, than EPA in their approaches to environmental problems."

As other authors have noted:

> Twenty years ago, one of the main reasons for an increased federal role in environmental protection was the inadequacy of state programs, including state enforcement. Today, allowing states and, in some cases, local governments, to reassume a greater enforcement role may be the only way to ensure an effective enforcement presence among the tens of thousands of regulated entities that now exist in each state. Strong, well-focused enforcement efforts designed to address the varying types of regulated entities in each state are necessary to obtain the high levels of voluntary compliance without which the vast regulatory programs will not succeed.

Hubert H. Humphrey & LeRoy C. Paddock, *The Federal and State Roles in Environmental Enforcement: A Proposal for More Effective and More Efficient Relationship*, 14 Harv. Envtl. L. Rev. 7, 36-37 (1990).

The effectiveness of the State of Alaska to enforce its air pollution program and advance the purposes of the CAA was certainly demonstrated in this case.

The CAA requires BACT to be determined "on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs." 42 U.S.C. § 7479(3). It would be hard to find a statutory provision calling for greater discretion. In accordance with this provision, ADEC considered a number of pollution control devices, including SCR, and concluded that "Low NOx" controls was BACT for the Red Dog Mine because it minimized emissions and was substantially more cost effective than other alternatives. The Ninth Circuit acknowledged this fact and the EPA has not shown otherwise. *See Alaska Dept. of Environmental Conservation v. United States EPA*, 298 F.3d 814, 817 (9th Cir. 2002). ADEC also took into account the potential loss of jobs and decline in world competitiveness at the mine if SCR was required. But EPA ignored all of these factors and ordered ADEC and the mine to utilize the more expensive, perhaps even economically infeasible, but less effective overall emission control technology.

Showing greater sophistication than EPA demonstrated in addressing this permit issue, ADEC went beyond the economic considerations and took into account the overall goal of the CAA and the purpose of BACT, to minimize emissions, and authorized the use of "Low NOx" controls. Instead of the more costly and less effective SCR, Cominco was willing to install "Low NOx" technology on all of the mine's generators, even those not subject to BACT requirements. Thus, the State was able to gain concessions from the Red Dog Mine that it could not require by regulation and minimize emissions at the same time.

This Court encouraged this approach in an analogous situation in *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49 (1987). In *Gwaltney*, this Court considered whether the citizen suit provision in the Clean Water Act authorized citizen suits for wholly past violations. This Court determined the Act did not confer such jurisdiction. To

the contrary, this Court concluded that the citizen suit provision of the Clean Water Act was intended to support the government's enforcement program and not displace it. To make its point, this Court suggested a hypothetical. "Suppose," this Court said, "the Administrator [of EPA] identified a violator and issued a compliance order." *Id.* at 60. "Suppose further that the Administrator agreed not to assess or otherwise seek civil penalties on the condition that the violator take some extreme corrective action, such as to install particularly effective but expensive machinery, that it otherwise would not be obliged to take." *Id.* at 60-61. "If citizens could file suit, months or years later, in order to seek the civil penalties that the Administrator chose to forgo, then the Administrator's discretion to enforce the Act in the public interest would be curtailed considerably." *Id.* at 61.

But that is the case here. If EPA can displace a state's air pollution enforcement program by invalidating a discretionary state air permit decision, as the lower court held it could, at virtually any time, to pursue its own enforcement goals, then the state's discretion to enforce the CAA in the public interest would be curtailed considerably. EPA's overriding order to use less effective but more expensive SCR emission controls not only robbed the State of Alaska of its discretionary power to determine BACT, but the order would harm the local community and, ironically, the environment. This defies common sense and the clear purpose of the Act. It is no wonder that "[s]tates sometimes claim that the agency . . . pays more attention to details than to overall policy objectives." Elliott, *supra*, at 10010. Congress could not have intended to undermine the primary responsibility of the states, to enforce the CAA, by ad hoc federal invalidation of discretionary state permit decisions.

II

DEFERENCE TO STATE PERMIT DECISIONS UNDER A FEDERALLY APPROVED AIR POLLUTION PLAN FURTHERS THE GOALS OF FINALITY AND FAIRNESS, REGULATORY EFFICIENCY, LOCAL EMPOWERMENT, AND CONSIDERATION OF LOCAL INTERESTS AND NEEDS

In our brief in support of the Petition for Writ of Certiorari, we cited two articles demonstrating how EPA's nullification of state enforcement actions–and by analogy discretionary state permit decisions--undermines federal goals for environmental protection. In the first article, the author examined the EPA practice of "overfiling" under the CAA which, not unlike the order invalidating the air pollution permit in this case, involves an independent enforcement action when the state has already initiated an enforcement action against the same party. *See* Steven D. Cook, *State/Federal Enforcement of the Clean Air Act and Other Federal Pollution Laws: Federal Overfiling on State Enforcement Proceedings*, 1987 B.Y.U. L. Rev. 1085.

In sum, Cook identified three substantial problems with EPA's intrusion into state enforcement decisions. First, subsequent negotiations with EPA over conditions or penalties can delay resolution of environmental problems. *Id.* at 1095. Second, EPA interference discourages cooperation between the public and the states because of the knowledge that whatever the state decides the EPA may have to be satisfied later. *Id.* at 1096. And third, EPA interference undermines state credibility with the public because the regulated community cannot rely on state enforcement decisions. *Id.* Based on these observations, Cook concluded that EPA interference with state enforcement strategies actually undermines the federal goals of deterrence,

fair and equitable treatment of the regulated community, and rapid resolution of environmental problems. *Id.* at 1095-1101. The same can be said for EPA interference with state permit decisions.

In the second article, Humphrey and Paddock concluded, much like Cook, that when EPA overrides the states it results in redundant enforcement efforts, introduces uncertainty into the state enforcement program, saps the limited enforcement resources of state and federal agencies, undermines and disrupts the federal-state working relationships, and conflicts with the role of the states in addressing environmental problems. *See* Humphrey & Paddock, *supra*, at 39.

But Cook, Humphrey, and Paddock are not alone in this assessment. According to Wiens and Hefner, "The Environmental Protection Agency's . . . oversight role [under the Clean Water Act, the Clean Air Act, and the Resource Conservation and Recovery Act] has been clashing recently with Congress' explicit intent to vest primary enforcement authority in the states." Susan K. Wiens & William P. Hefner, *Disharmony in EPA's Overfiling Policy*, 15 SUM Nat. Resources & Env't 3 (2000). The clash derives from ad hoc EPA interference with state enforcement decisions. *Id.* at 3.

Although Wiens and Hefner report that EPA intrusion into state programs is rare, involving only about 0.1% of state enforcement actions in fiscal years 1994 and 1995, they note that the numbers do not account for the disruption to state programs caused by the mere threat of EPA interference which "causes numerous problems." *Id.* at 6. One of the more serious problems is "uncertainty in the public mind." *Id.* After all, with whom should industry deal? "Must it negotiate with both state and federal authorities? Should it insist that the EPA sign off on all agreements with authorized state agencies?" *Id.*

Other problems include waste of federal and state resources. *Id.* at 7. In the present case, for example, both the

State of Alaska and the EPA are diverting limited resources to litigate the scope of EPA authority caused by EPA invalidation of the State's discretionary BACT determination—a use of resources that should be unnecessary. Beyond these problems, however, Wiens and Hefner conclude that EPA intrusion into state enforcement decisions causes "distrust among the agencies" although "each believes it is acting in the best interest of the environment." *Id.*

On the other side of the coin, Melnick and Willes point out the numerous benefits that accrue when EPA defers to state and local permit decisions. *See* Marc Melnick & Elizabeth Willes, *Watching the Candy Store: EPA Overfiling of Local Air pollution Variances*, 20 Ecology L.Q. 207 (1993). Although these authors do not favor absolute local autonomy, they have found compelling arguments for relying on state and local permit decisions, including "arguments for finality and fairness, efficiency, empowerment, and local interests." *Id* at 250.

A. Finality and Fairness

According to Melnick and Willes, federal reliance on state and local permit actionss would accomplish two purposes. "First, it would allow for finality in decisions." *Id.* at 251. Applicants who receive a permit would be assured that their actions are authorized and need not fear a federal challenge. *Id.* They would also have to contend with only one regulator which would allow businesses more definite planning. *Id.* Second, "[s]ole enforcement authority might also be more fair." *Id.*

> A source that fulfills the local requirements feels whiplashed when it suddenly finds itself subject to a federal enforcement action. While regulators may not be overly sensitive to this issue, the fairness argument has merit in the equitable realms of the courts . . . . Furthermore, fairness creates a better

> atmosphere for cooperation between the regulated and the regulators, which produces better compliance.

Id.

B. Efficiency

"Fragmented enforcement authority can lead to duplication of effort, to delay, and to underenforcement." *Id.* at 252. Cook made a similar observation:

> Federal efforts merely duplicate the state's actions by requiring [the regulated entity] to go through a second set of negotiations. This new round of negotiations usually produces no additional benefit to the environment.

Cook, *supra*, at 1095.

C. Empowerment

Giving greater autonomy to local officials "vests in them greater responsibility for the overall enforcement scheme of the CAA." Melnick & Willes, *supra*, at 252. Exclusive autonomy would eliminate speculation about EPA interference with local decisions. *Id.* This would increase the credibility of local officials that would result in greater cooperation from the regulated community. *Id.* "Such cooperation would further the goals of environmental protection." *Id.*

D. Local Interests

Local officials take into account local conditions, like ADEC did in this case. "The resulting decision making is more responsive to local needs than it would be under a strict interpretation of the CAA." *Id.* at 253. According to Melnick and Willes, "While EPA may look only at environmental effects, local agencies are more likely to consider the whole picture." *Id.*

In this case, EPA looked only at the environmental effects of BACT on the new generator without considering the emissions from the facility as a whole. As ADEC determined, the use of "Low NOx" technology on all the generators, including those not subject to BACT, would reduce overall emissions more than SCR on the new generator. Not only is this in keeping with a proper BACT determination, that requires a case-by-case consideration of "energy, environmental, and economic impacts and other costs," 42 U.S.C. § 7479(3), but it also makes good sense and furthers the purpose of BACT and the CAA to reduce air pollution. Congress could not have intended to disturb such state determinations by overzealous EPA oversight.

CONCLUSION

EPA interference with discretionary state decisions, under a federally-approved state air pollution program, including state BACT determinations, undermines the statutory role of the states as the primary enforcer of national air quality standards. The invalidation of Alaska's air permit in this case also defies common sense and the purpose of the Clean Air Act to minimize air pollution.

For these reasons, this Court should overturn the decision below.

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